In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JOHN T. BOSKE, SHERIFF OF KENTON County, Ky., appellant,
v.
DAVID N. COMINGORE, APPELLEE.
No. 370.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF KENTUCKY.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This case is here upon an appeal from the decision of the United States district court for the district of Kentucky, rendered in chambers in said district on the 5th day of July, 1899, in a habeas corpus proceeding in which David N. Comingore was the petitioner and John T. Boske the respondent. Comingore, the appellee, was at the time and is now the collector of internal revenue of the United States for the sixth district of Kentucky, and Boske, the appellant, is sheriff of Kenton County, Ky.

Sections 4241 and 4258 of the code of Kentucky are as follows:

SECTION 4241. *Sheriff or auditor's agent to list property omitted.—Summons against owner.—Trial. —Penalty.*—It shall be the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years. The officer proposing to have such property assessed shall file in the clerk's office of the county in which the property may be liable to assessment, a statement containing a description of the property proposed to be assessed and the value of the corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five years (days) after the filing of such statement the clerk of the court shall issue a summons against the owner to show cause before the next regular term of the county court, which does not commence within five days after service of such summons, why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the sheriff of the county by delivering a copy thereof to the owner, if in the county; if not, then to his agent, attorney, or person in possession of the property. At the next regular term of the county court after the notice has been served five days, if it shall appear to the court that the property is liable for taxation, and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law; if

not liable, he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable to assessment either party may appeal, as in any other civil cases, except that no appeal bond shall be required where the court decides that the property is not liable to assessment for taxation. If the court shall decide that the property is liable to assessment, the clerk of the county court shall certify to the auditor of public accounts and the sheriff a description of the property and the amount of penalty and cost of assessment. All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of taxes due and cost of assessment except where such property shall have been duly listed by the owner thereof. The taxes and penalties shall be collected and accounted for as other taxes and penalties are required to be collected. As a compensation for his services in causing such property to be assessed, the officer filing the statement shall be entitled to the penalty which shall be paid to him after the full amount of taxes shall have been collected. The county clerk shall enter all such assessments, the names of the persons against whom the assessment is made, the location and quantity of the property assessed, the value fixed thereon; and the officer collecting the tax shall, when the same is paid, notify the clerk of its payment, which payment shall be noted by the clerk opposite the entry of such assessment (see further sec. 4258).

SECTION 4258. Auditor may appoint and remove agent in each county. The auditor of public accounts may appoint an agent in each county of this Commonwealth. This agent shall hold his office

and be removed at the pleasure of the auditor (see further, as to duties, sec. 4241, transcript, p. 1).

It appears that a proceeding was instituted under section 4241 in Carroll County court in the name of the *Commonwealth of Kentucky, plaintiff*, v. *Elias Block & Sons, defendants*, the allegation being that the said Block & Sons, who were distillers of spirits from grain, had failed to list for taxation certain distilled spirits belonging to them which were then actually in, or had been in, the bonded warehouse of said distillers at their distillery and which, under the laws of Kentucky, was liable to assessment for State taxes, the object of the said proceeding being to list the said spirits for taxation under the provisions of the section above quoted. The plaintiff in the case, in order to obtain testimony as to the existence of the spirits, served notice on David N. Comingore, who is the collector of internal revenue for the Sixth Kentucky district, that his deposition would be taken before W. A. Price, a notary public of Kenton County, Ky., in the city of Covington, in said county, on the 1st day of March, 1899. Comingore appeared before the notary on the day designated and after having been sworn as a witness the taking of his deposition was proceeded with. In the course of the examination the witness was asked the following questions, and gave answers thereto as severally set forth (record, p. 2):

3. Did the defendants, Block & Sons, owners of said distillery, make, under the provisions of the laws of the United States, reports to your office as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on said distillery premises from the year 1887 down to

the present time? If so, how often under the provisions of the law do they make such reports?

A. They make reports monthly.

4. Did they, under the provisions of said law, also make applications to your office during said time for permission to withdraw such liquors from bond? If so, how often?

A. They make applications whenever withdrawals are made; daily if they choose.

5. Are these reports of deposits and requests for privilege to withdraw, or official records made therefrom, now in your office, or under your control in any way, for the period commencing October 1, 1885, and ending July 1, 1897?

A. They are on the files of this office, but not under my control, except as collector.

6. Please file official copies of them and make them a part of your deposition.

A. I will have to decline to do this under section 3167 of the Revised Statutes of the United States and the rulings of the Department.

7. What rulings of the Department do you refer to other than section 3167 of the statutes?

A. The ruling of the Department is as follows: "The Department does not permit the giving out of anything contained in internal-revenue returns or documents by a collector, storekeeper, or any other officer of a collection district for purposes other than those which the statutes of the United States contemplate."

8. Who made that ruling of the Department?

A. It is made by the Secretary of the Treasury, through the Internal Revenue Commissioner.

Upon the refusal of Comingore to file official copies of the reports which are referred to in his examination, Price, the notary, adjudged him in contempt of court

and of the said notary public for the said failure and refusal to file said copies and make them a part of his deposition, and the notary further adjudged that the Commonwealth of Kentucky then and there recover of Comingore the sum of $5 as a fine, and that he be taken by the sheriff of Kenton County and confined in the jail of said county for the space of six hours or until he was willing to furnish such copies or permit access to the records of his office, in order that information might be obtained to be used as evidence in the case against Block & Sons. The notary made report of his action in adjudging Comingore guilty of contempt to the Carroll County court, and on the 3d day of April, 1899, the said county court made and entered an order approving the judgment and action of said notary. The following is the said order of the county court (beginning on p. 7 of the record):

> It is therefore ordered and adjudged by the court that the plaintiff's motions be sustained and that plaintiff is entitled to use as evidence the facts stated in the reports and papers filed by any or all of the defendants in the office of the collector of internal revenue for the sixth district of Kentucky, and also such facts as are stated in the reports made to said office by certain officers known as United States storekeepers, and any other similar records, papers, documents, or exemplifications in said office tending to show the amount of liquors on hand at the distillery of the defendants on the 15th day of September, 1889, 1890, 1891, 1893, 1894, 1895, 1896, and on the 15th day of November, 1892; it is further ordered that the witness, D. N. Comingore, make or cause to be made, or permit the plaintiff, its agent, or attorneys to make, true

copies of such of said papers as the plaintiff or its attorneys may demand, and that said Comingore, as collector, attest the same and attach his seal of office thereto, if he has such seal, and that he permit the plaintiff or its agents or attorneys to compare said copies with the originals and verify same, and that he shall also testify further in regard to same, if demand be made, and leave is hereby given to complete the taking of said deposition on giving proper notice, and for this purpose the clerk is directed upon request of plaintiff's attorneys to transmit said deposition as now on file to W. A. Price, notary public, Covington, Ky. It is further adjudged that the action of the notary public, Price, in adjudging the witness, D. N. Comingore, to be in contempt for failure to file copies of reports, papers, documents, and exemplifications or to testify as to their contents, as requested, be sustained and affirmed, and that the Commonwealth of Kentucky recover of said D. N. Comingore the sum of $5 as a fine, and that he be taken by the sheriff of Kenton County, Ky., and confined in the jail of said county for the space of six hours, or until he signifies his willingness to comply with the request made in the deposition attempted to be taken, as follows:

Please file official copies of the reports made to your office by Block & Son as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on their distillery premises from the year 1887 down to the present time, and also official copies of applications made by them to your office during said time for permission to withdraw such liquors from bond.

Also with the following request:

Please file official copies of such reports of the United States storekeepers as show the liquors on

hand at the warehouses on the distillery premises of the defendants in Carroll County on September 15, 1890, September 15, 1891, November 15, 1892, September 15, 1893, 1894, 1895, and 1896.

To all of which the defendants except.

The clerk of the court is ordered and directed to make out attested copies of this judgment and order, and forward same to the sheriff of Kenton County, Ky., and W. A. Price, notary public, as warrant and authority for the enforcement thereof, to which the defendants also except.

After the entering of this order by the county court, to wit, on June 27, 1899, the attorney for the Commonwealth of Kentucky who appeared in the proceeding on the part of the Commonwealth against Block & Sons, in company with Price, the notary public, went to the office of the collector of internal revenue at Covington, Ky., and Comingore, the collector, being present, the said attorney, in the presence of Price, the notary public, propounded to Comingore the following question:

I call your attention to the opinion of the court rendered April 3, 1899, copy of which has been furnished you and as to which you have had ample time to be advised fully, and now ask if you will file official copies of such reports of the United States storekeepers, spoken of at the time of the former taking of your deposition, as show the amount of liquor on hand at the warehouses of the defendants on their distillery premises in Carroll County, Ky., on September 15, 1890, September 15, 1891, November 15, 1892, September 15, 1893, September 15, 1894, and September 15, 1895, and September 15, 1896, or allow us on behalf of the plaintiff in this action access to and inspection of

> such records or papers for the purpose of taking copies for use on behalf of the plaintiff as evidence in this action.

To which Comingore made the following answer:

> I will have to decline, just as I did in the other case, and for the same reason as given in the other case.

Thereupon Comingore was again adjudged by Notary Price to be in contempt of the said county court and of W. A. Price, a notary public, and further, that the Commonwealth of Kentucky recover of Comingore the sum of $5 as a fine, and that he be taken by the sheriff or some constable of Kenton County and be confined in the jail of said county for the space of six hours, or until he should signify his willingness to purge himself of the said contempt and testify and give the information from the records and documents under his control and in his custody as collector of internal revenue of the United States for the sixth district of Kentucky, or allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action of the *Commonwealth of Kentucky* v. *Block & Sons* in said county court. And the said Price then and there issued and delivered to the said John T. Boske, sheriff of Kenton County, Ky., a written order of commitment. The sheriff took Comingore in custody by virtue of the order delivered to him by Price, the notary, and it was while in custody under this process that Comingore filed his petition before Judge Evans, of the district of Kentucky, for the writ of habeas corpus. Boske, the sheriff, made return to the writ of habeas corpus which was

served upon him and produced the body of Comingore before Judge Evans in response to the mandate of said writ. Upon investigation of the case, Judge Evans discharged the prisoner from custody, at the same time delivering an opinion upon the matters involved in the case, which opinion is fully set forth in the record.

From this judgment of the district court, John T. Boske, the sheriff, prayed an appeal to the Supreme Court of the United States, and this is how the case is brought here for review by this court.

When Boske produced Comingore, his prisoner, before Judge Evans in response to the mandate of the writ of habeas corpus, he made a written return upon the writ, which will be found in the record, beginning on page 11 and ending on page 15. The said return, which is somewhat lengthy, is simply a rehearsal of the proceedings which had been taken before the notary and the county court, with the addition of correspondence between the Secretary of the Treasury of the United States and the attorneys representing the Commonwealth of Kentucky, together with legal propositions which are contended for by the appellant in this case. When the district judge had rendered his decision in the habeas corpus proceeding, a bill of exceptions on the part of the respondent, Boske, was signed and filed (record, p. 28), and is as follows:

> Be it remembered that on the 5th day of July, 1899, on the calling of the above-entitled matter for trial, the attorneys for the respondent offered and introduced as a witness Maxwell S. Barker, and avowed that they would prove by him the following facts: That he, while acting as State auditor's agent

for Jefferson County, Ky., had obtained from collectors of internal revenue the information shown by their records, documents, and reports as to the amount of liquors in store in the bonded warehouses and the times and amount of withdrawals of liquors from bond, when he had the consent of the distiller or distillers as to whose product the information was sought, and offered to amend the return or response to the writ accordingly; to which evidence and motion the relator, by attorney, objected, and the court sustained the objections and refused to allow said motion or the introduction of such testimony on the trial, even if true, on the ground that it was immaterial and wholly irrelevant; to which ruling of the court the respondent, by attorney, excepted, and time to and including July 8 was given to prepare and file his bill of exceptions, and this bill of exceptions is hereby affirmed, allowed, and settled and made part of the record herein.

WALTER EVANS, *Judge.*

Thereupon the attorneys for the respondent filed the following assignments of error (record, p. 30):

Comes now the respondent, John T. Boske, sheriff of Kenton County, Ky., and filed the following assignment of errors, upon which for himself and the Commonwealth of Kentucky he will rely in the prosecution of the appeal from the decision and judgment rendered by this honorable court on the 5th day of July, 1899, in the above-entitled matter:

1. That the said court erred in rendering the decision and judgment in the said matter against the respondent, acting as sheriff for and on behalf of said Commonwealth of Kentucky, as shown by him in his return to the writ issued herein against him, and in deciding that the imprisonment and detention

of the relator by the respondent was in violation of the Constitution and laws of the United States, and in discharging the prisoner from custody, and in rendering judgment against this respondent for costs, and that said judgment and decision is contrary to law and the facts, as stated in the pleadings in said matter.

2. That the said court erred in refusing to permit the introduction of the testimony of the witness Maxwell S. Barker, as follows: That he, while acting as State auditor's agent for Jefferson County, Ky., had obtained from collectors of internal revenue the information shown by their records, documents, and reports as to the amount of liquors stored in the bonded warehouses and the times and amount of withdrawals of liquors from bond, when he had the consent of the distillers as to whose product the information was sought, and the offer made in connection therewith to amend respondent's return to the writ.

3. That the court erred in not rendering a decision dismissing the petition, discharging the writ, and remanding the prisoner to the custody of respondent as sheriff aforesaid.

Wherefore respondent and appellant prays that the decision and judgment of said court be reversed and such directions given that full force and efficacy may be allowed to the process and writs of the Commonwealth of Kentucky by reason of the defense set up in the return and response to the writ issued against him herein, and for all proper relief.

WINSLOW & WINSLOW,
Attorneys for John T. Boske, Sheriff Kenton County, and Commonwealth of Kentucky.

ARGUMENT.

I.

Before reaching the questions involved in this appeal, which are based upon the exception taken at the hearing below and the assignments of error, the court may take under consideration the question as to whether or not an appeal in this case directly from the district court to the Supreme Court will lie.

Anterior to the circuit court of appeals act, appeals in cases like this were regulated by the provisions of sections 763 and 764 of the Revised Statutes, which said sections read as follows:

> SEC. 763. From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the case is heard.
>
> 1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States.
>
> 2. In the case of any prisoner who, being a subject or citizen of a foreign State, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign State or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.
>
> SEC. 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court

in the cases described in the last clause of the preceding section.

It will be seen that, under the law as it then stood, no appeal to the Supreme Court was allowed from the district court to the Supreme Court, but such appeals were from the district court to the circuit court of the district in which the case was heard, and from the final decision of the circuit court an appeal was authorized to the Supreme Court in the classes of cases described in the last clause of section 763.

So, then, if there had been no change in the law, the appeal in this case should have been taken from the decision of the district court to the circuit court of the district. The law relative to appeals, however, is changed by the act to establish circuit courts of appeals, etc., approved March 3, 1891 (26 Stat., 826). The portion of the last-mentioned act relating to appeals and writs of error will be found in sections 4, 5, and 6, which are as follows:

> SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals

hereby established according to the provisions of this act regulating the same.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital crime (as amended by act of January 20, 1897).

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review in such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely

upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

The appellate jurisdiction, therefore, formerly exercised by the circuit courts under section 763 of the Revised Statutes, is now by the said sections 4, 5, and 6 of the act of March 3, 1891, transferred to the circuit courts of appeals, except in certain cases in which appeals direct to the Supreme Court are allowed. In the case at bar the appeal is taken from the final decision of a court inferior to the circuit court upon a writ of habeas corpus and in a case in which it was alleged that a person (Comingore) was restrained of his liberty in violation of the Constitution of the United States. This is one of the cases, therefore, described in the first paragraph, taken together with subdivision 1 of section 763 of the Revised Statutes of the United States; and, as before suggested, the appeal from the district court, under the law as it existed before the circuit court of appeals act went into effect, could only have been taken to the circuit court of the district in which the case was heard.

The only question that remains, then, is as to whether this case comes within any one or more of the classes of cases in which, under the provisions of the circuit court of appeals act, an appeal may be taken from the district court direct to the Supreme Court.

When we look at the bill of exceptions (Record, p. 28), and the assignments of error (Record, p. 30), there does not appear to be any question raised which would authorize the appeal.

But I do not intend to do more than merely call the attention of the court to the statutes governing appeals and the record in this case, and therefore will not pursue the point further.

II.

The appellant raises the question of the jurisdiction of the district court for the first time in his brief. There is nothing in the record which even intimates that the authority of the district court to issue the writ of habeas corpus in this case and to proceed to a hearing thereon was questioned in the court below. On the other hand, as before stated and shown by the record, the return by appellant on the writ set up the right to hold Comingore in custody by virtue of the contempt proceeding and that alone, and the only exception taken at the hearing was to the refusal of the court to hear testimony offered by the respondent tending to show that it had been the custom of certain internal-revenue officers theretofore to furnish such information as was being sought by the examination of Comingore. Having failed to question the jurisdiction of the court upon the return of the writ or upon the hearing in the district court, and thus make the issue as to the jurisdiction and have that question alone certified to the Supreme Court as required by the second paragraph of section 5 of the circuit court of appeals act, the appellant is in no position now to raise the question of jurisdiction here.

If, however, the question of jurisdiction is before the court, I insist that the district court for the district of Kentucky had ample power to issue the writ of habeas corpus in this case, and, upon the return thereof with the body of the petitioner, to proceed to investigate the cause of his caption and detention and to discharge him. The facts upon which the petition for the writ was based

were that Comingore was collector of internal revenue for the sixth Kentucky district; that he had been called before a notary public in order that his deposition might be taken to be used as evidence in behalf of the plaintiff in a case between the Commonwealth of Kentucky as plaintiff and Block & Sons, defendants, pending in the county court of the county of Carroll, Kentucky; that when Comingore was being examined it was demanded of him that he produce official copies of certain reports which he stated he had in his custody as collector of internal revenue and which had been made by Block & Sons, distillers, in reference to the operations of the distillery of the said Block & Sons, and also as to the distilled spirits deposited in their bonded warehouse; that the collector, Comingore, refused to furnish such official copies, and placed his refusal on the ground that he was forbidden so to do by a statute of the United States and also by regulations of the Treasury Department issued in pursuance of and in the execution of the internal-revenue laws of the United States. For this refusal proceedings in contempt were taken against Comingore, and he was adjudged to pay a fine and be imprisoned and to remain in prison until he should either furnish the official copies demanded or permit the notary or others to enter the collector's office and make an examination with a view to obtaining the information desired; and it was under this proceeding that he was in the custody of Boske, the sheriff of Kenton County, Ky.

It is contended, therefore, that Comingore was in custody in violation of the Constitution and laws of the

United States and that the act done by him was in pursuance of a law of the United States, and that under the provisions of section 753 of the Revised Statutes he was entitled to the writ of habeas corpus. If, however, it should be held that the act done by Comingore was not in pursuance of a law of the United States, I submit that he was in custody in violation of the Constitution of the United States, because of the fact that he was being deprived of his liberty without due process of law (Amendment V, Constitution of the United States. Amendment XIV, Constitution, section 1.)

It will be observed by perusing the record of the proceedings which were taken by Price, the notary, that at his first sitting to take the deposition of Comingore, which was on the 1st of March, 1899, he adjudged Comingore guilty of contempt because of his refusal to furnish the official copies of documents or papers demanded, and ordered that the Commonwealth of Kentucky recover of Comingore $5 and that he be imprisoned for the space of six hours, or until he was willing to furnish copies or permit access to the records. Price reported this action to Carroll County court, and thereupon the county court made an order on the 3d day of April, 1899 (which order is copied heretofore in the statement of the case, and which will be found in the record, beginning on page 5 and ending on page 8), in which the said court rendered judgment in accordance with the report of the notary.

Subsequent to this action of the county court, to wit, on the 27th of June, 1899, Price, the notary, in company with a lawyer, appeared at the office of Comingore, the collector, in Covington, Ky., and called the collector's

attention to the opinion of the court rendered April 3, 1899, and again demanded of the collector that he file the official copies of the reports made by distillers relative to the liquor in the warehouses of Block & Sons on their distillery premises in Carroll County, Ky., on September 15, 1890; September 15, 1891; November 15, 1892; September 15, 1893; September 15, 1894; September 15, 1895, and September 15, 1896, or that the notary and the lawyer be allowed access to and inspection of the records and papers in the collector's office, for the purpose of taking copies thereof for use on behalf of the plaintiff as evidence in the case of the *Commonwealth of Kentucky* v. *Block & Sons*. Comingore stated to the notary and the attorney that he would have to decline as he had theretofore done and for the same reasons (Record, pp. 3 and 4), and thereupon Comingore was by the said notary again adjudged to be in contempt of said county court, and it was further adjudged by the notary that the Commonwealth of Kentucky recover from Comingore the sum of $5 as a fine, and that he be taken by the sheriff or some constable of Kenton County and confined in the jail of said county for the space of six hours, or until he should signify his willingness to purge himself of the said contempt and testify and give the information from the records and documents under his control and in his custody as collector of internal revenue of the United States for the sixth district of Kentucky, or allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action of the *Commonwealth of Kentucky* v. *Block & Sons* in said county court, *and the said W. A. Price*

then and there issued and delivered to the said John T. Boske, sheriff of Kenton County, Ky., a written order of commitment (Record, p. 4), and it was by virtue of this written order of commitment issued by Price on the 27th day of June, 1899, that Boske took Comingore into custody and was holding him at the time he applied for the writ of habeas corpus.

The statutes of the State of Kentucky applicable to the question which I am about to present are sections 535 and 538 of the Kentucky Code, 1895, and are as follows:

> § 535 (*595*) *Witness may be punished for contempt.* Disobedience of a subpœna; intentional evasion of a service of it, by concealment or otherwise; concealment or removal of a minor to prevent service of a subpœna upon him, or preventing his attendance as a witness, by a person having control of him; or a refusal to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when lawfully ordered, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required.
>
> § 538 (*598, 599*) *Punishment imposed for contempt.* The punishment for the contempt mentioned in section five hundred and thirty-five shall be by fine not exceeding thirty dollars, and imprisonment not exceeding twenty-four hours; but an officer imposing such punishment shall promptly report his action, and the reasons therefor, to the court in which the action is pending; and the court may vacate or modify the order of the officer, and shall render judgment for the fine imposed by the officer, or so much thereof as is approved by the court. If a witness refuse to testify, or to be sworn, or to give

> a deposition, he shall be imprisoned so long as he refuses; and if the court finally adjourns before he submits, he shall remain in prison until the next term, or until he testifies before an officer who is authorized to take his testimony. The final disposition of the case in which he so refuses shall discharge him from imprisonment.

I call the attention of the court particularly to the manner of proceeding provided in these statutes by which a witness before an officer engaged in taking depositions may be punished for contempt. Such officer has no authority to take final action or to issue any process to enforce a judgment punishing for contempt. The extent of the officer's power is, in case a witness has been guilty of a contempt as described in section 535, to so adjudge and to pronounce his judgment for fine and imprisonment. But this action is not final, nor is it enforceable. There is still another requirement in order to make the judgment effective, and that is *that the officer shall promptly report his action, and the reasons therefor, to the court in which the action is pending; and the court may vacate or modify the order of the officer, and shall render judgment for the fine imposed by the officer, or so much thereof as is approved by the court.*

Thus it will be seen that the judgment which is final and which can be carried into execution is not the judgment of the officer taking the deposition, but the judgment of the county court in which the action is pending. In this case, Price, the notary, reported his action taken on the 1st of March, 1899, when Comingore was before him as a witness, to the Carroll County court, in which

the suit of the *Commonwealth of Kentucky* v. *Block & Sons* was pending. The county court thereupon entered the order above referred to. In order to carry this final judgment of the county court into execution, the process should have been issued from that court. But no such process was issued. It does not even appear from the record that Price, the notary, had a certified copy of the judgment of the county court when he went in company with the lawyer to the office of Comingore on the 27th of June, 1899. He certainly had no order of the county court directing the punishment imposed upon Comingore to go into execution, nor was there any process directed to the sheriff or any other officer requiring him to take Comingore into custody. Therefore, it can not be held that Boske, the sheriff, took Comingore into custody by virtue of the judgment of Carroll County court, for the reason that the sheriff had no process in his hands from the court which authorized him to arrest Comingore and detain him in his custody; and if it is insisted that Comingore was in custody by virtue of the judgment of Carroll County court, he was then being deprived of his liberty without due process of law.

Further than this, it will be observed that when Price, the notary, visited the office of Comingore in Covington on the 27th of June, 1899, upon Comingore's refusal to comply with the demands made upon him at that time, Price proceeded again to adjudge Comingore guilty of contempt, and ordered him to pay a fine of $5 and to be imprisoned for six hours or until he should comply with the request, and without making any report at all of this action to the Carroll County court where the suit was

pending, he proceeded to write and deliver to the sheriff a commitment, as follows (Exhibit C, Record, p. 9):

The Commonwealth of Kentucky to the Sheriff or any Constable of Kenton County:

D. N. Comingore, being examined as a witness by deposition before me, as a notary public, for the purpose of using his testimony on the trial of a certain action pending in the Carroll County court, in which the Commonwealth of Kentucky is plaintiff and Louis T. Block et al. are defendants, and having been adjudged guilty of contempt of said court in refusing to answer certain questions then asked him and to give information as to the amount of distilled liquors in the custody of the defendants in said action at certain times, as shown from the records, documents, and reports on file in his office and under his control as collector of internal revenue for the United States for the sixth district of Kentucky, or to allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action, as shown by certified copies of the order and judgment of said court hereto attached as part hereof, as well as the action had and recorded by me in the taking of said depositions:

These are, therefore, to command you to take the body of the said D. N. Comingore, and him safely keep or confine him in the jail of Kenton County for the space of six hours and until he shall satisfy the Commonwealth of Kentucky the sum of $5.00 adjudged against him for contempt or until he shall signify his willingness to purge himself of the said contempt and testify and give information from the records and documents under his control and in his custody as collector, as aforesaid, and how you shall have executed this writ you will make known to me at my office, in Covington, Ky., or the judge of the

Carroll County court, at his office, at Carrollton, Carroll County, Kentucky, and with such return produce this writ.

Witness my hand and seal of office as notary public for Kenton County, Kentucky, this 27th day of June, 1899.

[SEAL.] W. A. PRICE, *N. P., Ky.*

And it was by virtue of this commitment that the sheriff then and there took Comingore into his custody and was holding him at the time the writ of habeas corpus was issued by the district judge. In this connection I call attention to the record in reference to the action of Price on the 27th of June, 1899, which will be found in the petition for habeas corpus in paragraph 5, beginning on page 3 of the record.

The commitment issued by Price, the notary, in obedience to which Boske arrested Comingore and took him into custody, was without authority of law. Price, although a notary public of Kenton County, in the State Kentucky, was not authorized to issue process to carry into execution a judgment of Carroll County court, nor could he make a judgment in contempt final and issue process to enforce it.

So, then, we may consider the case in either view.

If it was intended to arrest Comingore for the first instance in which he had been adjudged guilty of contempt, there was no process, from the court which made the judgment final, which authorized any officer to take him into custody. And if the commitment was in consequence of the second action of Price, the notary, then there was no judgment for contempt, because the law says that it is not

a judgment until the action of the officer is reported to the court in which suit is pending and the judgment approved there. Therefore, in either case there was no due process of law in the hands of the officer under which Comingore could be arrested and held in custody, and hence he was being restrained of his liberty without due process of law.

If Comingore had not been a Federal officer he would have been entitled to relief from such an arrest through the instrumentality of the writ of habeas corpus issued by a Federal judge. But the circumstances surrounding Comingore present even a stronger case. He was collector of internal revenue, in the discharge of his official duties; he was acting in pursuance of a law of the United States and in obedience to regulations issued by the Secretary of the Treasury for the government of collectors in the conduct of official duties; and for having taken such action he was arrested by a sheriff under a commitment unlawfully issued by a notary public. Will anyone seriously contend that this is not a case in which a Federal judge could afford relief by writ of habeas corpus, not only to Comingore as a citizen, but to him as an officer of the United States engaged in the proper discharge of the duties of his office?

The appellant in his brief takes the position (though apparently without much confidence) that Comingore should have sought relief by appeal to the higher courts of the State of Kentucky. It is true that a State court is under the same high obligation to support, construe, and give effect to the Constitution of the United States

that a Federal court is. But if it does not do so the Federal courts have jurisdiction, and they may in any stage of the case exercise their discretion and release on habeas corpus anyone who is in custody under State authority in violation of the Constitution or laws of the United States. (Church on Habeas Corpus, § 84, p. 129, and authorities cited in note 3.)

In the same work, section and note just cited, it is said:

> The right of appeal, while enforcing one's rights in the State courts is often an expensive, slow, and inadequate remedy, and he ought not to be made to suffer the expense, delay, and uncertainty of the rulings in the State courts, where he clearly shows that his imprisonment, though under State process, is in violation of the Constitution of the United States;

in support of this principle citing *Ex parte Kieffer* (40 Fed. Rep., 399); *In re Reinitz* (39 Fed. Rep., 204); also *In re Christensen* (43 Fed. Rep., 243); *In re Wan Yin* (10 Sawy., 532; 22 Fed. Rep., 701).

In the last case cited it is well said that—

> The Supreme Court is too far away, and the way there is too expensive, to furnish relief in the great majority of cases, either upon a direct application or an appeal from the State court.

I refer also to the case *In re Neagle* (135 U. S., 1) as direct authority upon the question involved in this case. The decision in that case is so familiar to the court that I do not deem it necessary to go further than to say that it settles definitely the principle that a person who is in custody for an act done in pursuance of a law of the United States, or is in custody in violation of the laws

or Constitution of the United States, has the right by writ of habeas corpus to be brought before any court of the United States, or justice or judge thereof, for the purpose of an inquiry into the cause of his detention.

III.

I now come to the consideration of the principal question in controversy, and that is as to whether the plaintiff in the proceedings in Carroll County court, Kentucky, the case of the *Commonwealth of Kentucky* v. *Elias Block & Sons*, brought under the Kentucky statute hereinbefore set out, could by law require the collector of internal revenue to furnish the information demanded of him to be used as evidence in the said proceeding. In other words, has the said court the right to compel the collector of internal revenue to produce the records and papers of his office, such as are referred to in this case, to be used as evidence in a suit pending in such court?

In order that the court may fully understand the character of reports required under the regulations of the Treasury Department in the administration of the internal-revenue laws in connection with the business of distillers, both by officers and the distillers themselves, I have caused some of the blank forms adopted and used for this purpose to be attached to this brief and marked respectively "A," "B," and "C." It is true that these forms are no part of the record and they do not appear in the statement of facts; but being those prepared and used under the regulations promulgated for the more effectual assessment and collection of taxes under the

internal-revenue laws, I do not consider it improper to submit them to the court for consideration in passing upon the question involved.

The paper marked "A" is numbered 88 and is, as will be seen, the blank required to be used by the Government storekeeper assigned to a distillery in making his monthly report of materials used, mash or beer produced, and spirits warehoused at the distillery which is being operated under the supervision of such storekeeper.

The paper marked "B" is numbered 88½ and is the form on which the storekeeper makes his report of the time of filling and emptying fermenting tubs, etc., at the distillery.

The paper marked "C" is numbered 59 and is the form used by the gauger in making report of spirits deposited in the warehouse.

There are other forms on which reports are required to be made by officers having in charge distilleries and distillery warehouses, but I have given sufficient of them to show to the court the character of these reports, the information which they contain, and the purposes for which they are required.

In connection with these reports I call the attention of the court to section 3263, Revised Statutes, which is as follows:

> SEC. 3263. Every distiller and person intending to engage in the business of a distiller shall, previous to the approval of his bond, cause to be made, under the direction of the collector of the district, an accurate plan and description, in triplicate, of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler,

worm tub, and receiving cistern, the course and construction of all fixed pipes used or to be used in the distillery, and of every branch and every cock or joint thereof, and of every valve therein, together with every place, vessel, tub, or utensil from and to which any such pipe leads or with which it communicates; also the number and location and cubic contents of every still, mash tub, and fermenting tub, the cubic contents of every receiving cistern, and the color of each fixed pipe, as required in this Title. One copy of said plan and description shall be kept displayed in some conspicuous place in the distillery, and two copies shall be furnished to the collector of the district, one of which shall be kept by him, and the other transmitted to the Commissioner of Internal Revenue. The accuracy of every such plan and description shall be verified by the collector, the draughtsman, and the distiller; and no alteration shall be made in such distillery without the consent, in writing, of the collector. Any alteration so made shall be shown on the original, or by a supplemental plan and description, and a reference thereto noted on the original, as the collector may direct; and any supplemental plan and description shall be executed and preserved in the same manner as the original.

The survey made under the provisions of this section gives in minute detail a description of the distillery, its machinery, apparatus, pipes, joints, the size, location, and capacity of the fermenting tubs and receiving cisterns. In other words, it contains in full the plan of the distillery, its method of operation, and capacity for production of distilled spirits. Two copies of the plan and description thus made are furnished to the collector of the district, one of which is kept by him and the other trans-

mitted to the Commissioner of Internal Revenue. A third copy of the survey is required to be kept displayed in the distillery. The object of this last requirement is obvious. It is not to give the public an opportunity to learn the facts which the survey contains, but it is to have it inside the distillery so that an officer visiting the distillery and one who has legal authority to enter and examine the same can compare the apparatus, operations, and product with the plan and description and ascertain if the business is being conducted properly and in accordance with the survey. Within the distillery is not a public place, but the private property of the owner, and the right to enter is confined to the Government officers and the owner and his employees.

I have adverted to section 3263, however, more particularly to point to the fact that the report of survey is on file with the collector of the district, and is as much a record of his office as the reports made by the storekeepers, gaugers and distillers. If, therefore, a State court can compel the production of the latter to be used as evidence in behalf of a party to a suit pending in such court, it can also compel the production of the survey or plan and description of the distillery for the same purpose. If the State court has such power, the collector of internal revenue, who is the custodian, by virtue of his office, of all these reports, can be made to disclose the contents of any and all of them, and thus be the means of giving to the public every detail of the business and operations of a distiller, including the construction, capacity, and daily work of the distillery. In

other words, under a subpœna duces tecum the collector of internal revenue could be forced to produce in a State court these reports, and thus permit any litigant, together with his attorneys, the court, the jury, and the bystanders, to pry into the plans and operations of any distillery which was being conducted under Government supervision. I find in section 3167, Revised Statutes (as amended by act of August 28, 1894), this provision:

> That it shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, * * * and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office and be incapable thereafter of holding any office under the Government.

It may be urged that the collector himself does not visit the distilleries in person, and, therefore, is not included within the provisions of the above statute. But to insist upon this position seems to me would be sticking in the bark. The purpose of the statute undoubtedly was to prevent officers who had the right to go into the manufacturing or producing establishments of persons who are operating under the internal revenue laws from disclosing the result of their examinations and making

known to outside parties the construction, plans, and the manner of operation of such establishments. The information which comes to the collector concerning the distilleries through the reports which are made to him, is derived through his subordinates, the internal revenue officers of the United States on duty in his district. It would seem to be idle to undertake to give this statute the effect that Congress must have intended, by interpreting it to mean that the subordinate officers and employees in the revenue service would be guilty of a crime if they divulged the information referred to in the statute, and yet leave the collector free to do the very thing that such subordinates are forbidden to do. The deputy collectors and revenue agents who visit distilleries do so for the purpose of assisting the collector in the discharge of his official duties, in order to make known to him whether such establishments are being conducted in accordance with the law and whether the product is being faithfully accounted for to the extent that it is manufactured. The storekeeper is assigned to the distillery and remains there really as the representative of the collector, in order to have continual supervision on the part of the Government over the operations; and the gauger is simply an additional agency through which the internal revenue taxes are to be assessed and collected.

Therefore, I insist that the provisions of section 3167 are as much applicable to the collector himself as to the other officers and employees included therein, and that a fair construction of this statute would make the collector

of internal revenue guilty of a misdemeanor if he should divulge to any person the operations, style of work, or apparatus of any distillery, the information concerning the same having come to him through the reports rendered by other officers of the internal-revenue service acting under such collector.

But I do not rely on section 3167 as the only authority for the action of the collector in refusing to comply with the demand for the reports in his possession. As will be seen, he was acting in compliance with the express terms of the following regulations (Record, pp. 23 and 24):

> TREASURY DEPARTMENT,
> OFFICE OF THE COMMISSIONER
> OF INTERNAL REVENUE,
> *Washington, D. C., April 15, 1898.*
>
> The following regulations are issued as supplementary to the instructions and suggestions contained on pages 41 and 42 of the regulations, series 7, No. 12, revised August 3, 1896:
>
> All records in the offices of collectors of internal revenue or any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose.
>
> Collectors are hereby prohibited from giving out any special-tax records or any copies thereof to private persons, or to local officers, or to produce such records or copies thereof in a State court, whether in answer to *subpœnas duces tecum* or otherwise.
>
> Whenever such subpœnas shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called

for, on the ground of being prohibited therefrom by the regulations of this Department.

The information contained in the records relating to special-tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or any copies thereof for use against the special-tax payers in cases not arising under the laws of the United States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy and not to be permitted.

As to any other records than those relating to special-tax payers, collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a State court or in a court of the United States, collectors should refer the persons interested to the following paragraph in Rule X of the rules and regulations of the Treasury Department, namely:

In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only, and on a rule of the court upon the Secretary requesting the same.

Whenever such rule of the court shall have been obtained, collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury, with a request for its authentication, under the seal of the Department, and transmission to the judge of the court calling for it, unless it

should be found that circumstances or conditions exist which make it necessary to decline, in the interest of the public service, to furnish such copy.

N. B. SCOTT,
Commissioner.

Approved:
L. J. GAGE,
Secretary of the Treasury.

The question then arises as to whether or not the Commissioner of Internal Revenue had the right to make these regulations, and if, when they were approved by the Secretary of the Treasury, they became effective and afforded protection to officers of the internal revenue who obeyed them.

Regulations made by the Secretary of the Treasury under section 251 of the Revised Statutes, not inconsistent with law and fairly within its scope and purpose, and not infringing upon any existing legal rights of individuals, have the force of law. (*United States* v. *Hutton*, 10 Ben. (Dist. Court Rep.), 268; 15 Opin., 128.)

Regulations made by the Commissioner, pursuant to the statutory authority, with the approval of the Secretary of the Treasury, in respect to the assessment and collection of internal taxes, have the force of statutes. (*In re Huttman*, 70 Fed. Rep., 699; *In re Weeks*, 82 Fed. Rep., 729. See also *Gratiot* v. *United States*, 4 How., 80; *Ex parte Reed*, 100 U. S., 13; *United States* v. *Barrows*, 1 Abb. U. S. Rep., 351; *United States* v. *Eliason*, 16 Pet., 304.)

When the Secretary of the Treasury, over his official signature, approved these regulations, they became regu-

lations of the Treasury Department. Section 161 of the Revised Statutes of the United States is as follows:

> The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

And in section 251 of the Revised Statutes will be found this provision:

> The Secretary of the Treasury shall make and issue from time to time such instructions and regulations to the several collectors, receivers, depositaries, officers, and others who may receive Treasury notes, United States notes, or other securities of the United States, or who may be in any way engaged or employed in the preparation and issue of the same, as he shall deem best calculated to promote the public convenience and security, and to protect the United States, as well as individuals, from fraud and loss; he shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws.

The internal-revenue bureau being a bureau of the Treasury Department, the Secretary, who is the head of the Department, has authority under section 161 to prescribe regulations, not inconsistent with law, for the conduct of the officers of the Department, for the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property

appertaining to it. The regulations before set forth were prescribed for the conduct of officers of the internal revenue in dealing with certain papers and reports which come into their possession and custody in the administration of the internal-revenue laws and in assessing and collecting the taxes under the provisions of these laws.

Section 251 goes further and empowers the Secretary of the Treasury *to make and issue from time to time instructions and regulations pertaining to the forms of entries, oaths, bonds, and other papers, and rules and regulations to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws.*

Following these is section 321 of the Revised Statutes which contains this provision:

> The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal-revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue.

It can not be disputed that under these statutes the Secretary of the Treasury, and the Commissioner of Internal Revenue under his direction, have full authority to make and issue such rules and regulations as are necessary or expedient in carrying out the purposes of the internal-revenue laws, provided such regulations and rules are consistent with the law. Then it may be considered as to whether or not the regulations set out before

are consistent with the law. The forms upon which reports are made of the operations of manufacturing establishments under the internal-revenue laws are all prescribed and distributed to the various officers in the internal-revenue service by the Commissioner of Internal Revenue. This is done, as the law requires, under the direction of the Secretary of the Treasury. These forms, as will be seen by reference to those which I have attached for the information of the court as part of this brief, contain various items of information which is useful only to those having in charge the enforcement of the internal-revenue laws, and together with other forms, including those prescribed for the reports to be made by distillers, are a part and parcel of the system adopted for the more effectual enforcement of the internal-revenue laws. This system is in accordance with the requirements of the internal-revenue laws, and regulations made in pursuance thereof by the Commissioner of Internal Revenue, under the direction and with the approval of the Secretary of the Treasury. The reports not only inform the chief officers with great particularity and in minute detail of the daily operations of manufacturing establishments where articles subject to internal taxes are produced, but they also contain information which can be made the basis of ascertaining as to whether the operators of such manufacturing establishments are violating the criminal laws of the United States. For instance, these reports made in connection with distilleries of spirituous liquors in their order give the measurement, character, and capacity of the distillery; then follow the reports of the daily operations, includ-

ing material of all kinds used in distillation, and, finally, the gauger's return of spirits in the warehouse as gauged and reported on the form marked "C." There is scarcely a stage in the process of distillation from the time that a distillery is constructed and is ready for operation until the packages are stamped in the warehouse and removed and sold that the distiller can not be guilty of some act of omission or commission for which he can be held criminally liable, and in the event of a prosecution these reports would furnish important data and information to the prosecuting officers. I contend, therefore, that the forms provided are such as a due enforcement of the internal-revenue laws authorize and require, and that they are forms which are consistent with the due execution of the said laws, and this being the case it is entirely consistent with the law that the Secretary of the Treasury, and the Commissioner of Internal Revenue under his direction, may make regulations as to the use of these forms, the reports sent up thereon, and as to the disposition of such reports at the hands of officers having them in custody.

So far in the discussion of the character of reports made concerning the operation of distillery establishments, I have considered those which are required of the officers of the Government, and the exhibits I attach are a part of the blank forms used by such officers. I have pursued this line in order to put the court in full possession of the method by which the assessing and collecting officers of the Government under the internal-revenue laws are kept advised from time to time from an official source of the operations of distilleries.

I now come to the reports made by the owner or operator of the distillery, as it was these reports made by Block & Sons, the owners of a distillery, which the plaintiff in the case pending in Carroll County court desired to have produced as evidence, and it was particularly as to these that official copies were demanded from the collector, or that he permit access to his office in order that they might be examined. The law under which reports are made by the owner or operator of a distillery will be found in sections 3303, 3304, and 3307 of the Revised Statutes, which are as follows:

> SEC. 3303. Every person who makes or distills spirits, or owns any still, boiler, or other vessel used for the purpose of distilling spirits, or who has such still, boiler, or other vessel so used under his superintendence, either as agent or owner, or who uses any such still, boiler, or other vessel, shall from day to day make, or cause to be made, in a book or books, to be kept by him in such form as the Commissioner of Internal Revenue shall prescribe, a true and exact entry of the kind of materials, and the quantity in pounds, bushels, or gallons purchased by him for the production of spirits, from whom and when purchased, and by what conveyance delivered at said distillery, the amount paid therefor, the kind and quantity of fuel purchased for use in the distillery, and from whom purchased, the amount paid for ice or water for use in the distillery, the repairs placed on said distillery or distilling apparatus, the cost thereof, and by whom and when made, and of the name and residence of each person employed in or about the distillery, and in what capacity employed. And in another book he shall make like entry of the quantity of grain or other material used for the production of spirits, the time of day when any yeast

or other composition is put into any mash or beer for the purpose of exciting fermentation, the quantity of mash in each tub, designating the same by the number of the tub, the number of dry inches, that is to say, the number of inches between the top of each tub and the surface of the mash or beer therein at the time of yeasting, the gravity and temperature of the beer at the time of yeasting, and on every day thereafter its quantity, gravity, and temperature at the hour of twelve meridian; also, of the time when any fermenting tub is emptied of ripe mash or beer, the number of gallons of spirits distilled, the number of gallons placed in the warehouse, and the proof thereof, the number of gallons sold or removed, with the proof thereof, and the name, place of business, and residence of the person to whom sold.

SEC. 3304. The books of every distiller hereinbefore required shall always be kept at the distillery and be always open to the inspection of any revenue officer, and, when filled up, shall be preserved by the distiller for a period of not less than two years thereafter, and whenever required shall be produced for the inspection of any revenue officer.

SEC. 3307. On the first day of each month, or within five days thereafter, every distiller shall render to the collector of the district an account in duplicate, taken from his books, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and of proof gallons of spirits produced and placed in warehouse. And the distiller or the principal manager of the distillery shall make and subscribe the following oath, to be attached to said return:

"I, ——— ———, distiller (or principal manager, as the case may be) of the distillery at ———, do solemnly swear that since the date of the last

return of the business of said distillery, dated —— day of ——— to ——— day of ———, both inclusive, there was produced in said distillery, and withdrawn and placed in warehouse, the number of wine gallons and proof gallons of spirits; and there were actually mashed and used in said distillery, and consumed in the production of spirits therein, the several quantities of grain, sugar, molasses, and other materials respectively hereinbefore specified, and no more."

One of the said duplicate returns shall be transmitted by the collector to the Commissioner of Internal Revenue.

Under section 3303 the owner or operator of a distillery is required to keep certain books, *the forms of which are prescribed by the Commissioner of Internal Revenue.* By reading this section it will be seen that the entries which the distiller is required to make in these books contain information of every detail in carrying on the business. The kind and amount of materials used, the quantity purchased, from whom and when purchased, by what kind of conveyance delivered, and the amount paid therefor; even the amount of fuel purchased and from whom, the amount paid for water and ice for use in the distillery, the repairs placed on the distillery or distilling apparatus, the cost thereof and by whom and when made, and the name and residence of each person employed in or about the distillery, and in what capacity employed. Not only is the quantity of grain or other material used at the distillery to be entered in these books, but the time of day when any yeast or other composition is put into any mash or beer for the purpose of exciting fermenta-

tion, the quantity of mash in each tub, the number of the tub, the size of the tub, the proportion of the tub which is filled with mash or beer, the gravity and temperature of the beer, etc., are to be entered.

Under section 3307, the distiller is required on the first day of each month, or within five days thereafter, to render to the collector of the district an account in duplicate taken from these books, and this return, or account, as it is called in the statute, is required to be made upon the oath of the distiller in the form prescribed in the said section. In other words, this return is nothing more nor less than an exact copy or reproduction of the entries made in the books required to be kept under section 3303, sworn to by the distiller.

What are known as withdrawals or entries for withdrawal are simply applications made by the distiller to the collector to pay the tax on spirits in the warehouse and withdraw the same for sale or consumption. These entries are made under the provisions of section 3294 of the Revised Statutes as amended by section 5, act of March 1, 1879, and section 5, act of May 28, 1880 (21 Stat., 145; see Compilation Internal Revenue Laws, 1894, p. 121). The entry is a description of the casks or packages to be withdrawn, and when made in the prescribed form and the tax paid on the spirits contained in the casks or packages, the collector issues his order to the storekeeper in charge of the warehouse for the delivery.

I think that in the foregoing I have presented to the court the law and the system adopted thereunder for the conduct of a distillery for the production of distilled

spirits from the survey which precedes the commencement of operations to the payment of the tax on the product and the withdrawal of the same from the warehouse. If I have gone too much into detail or become tiresome in presenting this part of the subject, my explanation is my desire that the court should see that the reports and accounts in the possession of the collector sent in by both officers and distillers are a part of the same system, adopted under the law, and carried into effect by regulations, consistent with the purposes of the law, issued by the Secretary of the Treasury, or by the Commissioner of Internal Revenue under the direction or with the approval of the Secretary.

The reports of the operations of a distillery made by the officer in charge and those made by the distiller are substantially the same. Now, the distiller makes his reports from the entries in the books kept by him under section 3303. These books are the originals, and the reports copies. If the plaintiff in the suit in the State court is entitled to have the contents of these books to be used as evidence, the originals are the best evidence, and the production of these should have been sought, and not the production of the copies in the custody of the collector. The books are in the possession of the distiller not only during the time in which the entries are being made, but when filled up such books are by section 3304 of the Revised Statutes, above quoted, required to be preserved for at least two years. If, therefore, these books are competent as testimony, why is it that Block was not subpenaed to produce them? Why did the plaintiff in the suit seek to utilize mere

copies, when the books themselves are the first and best evidence of what they contain, and are the property of the defendant and in his possession? I can account for this on no other ground than that it was an effort to circumvent the principle declared in *Boyd* v. *United States* (116 U. S., 616).

These books are the private property of the distiller. It is true that the law requires him to produce them for the inspection of revenue officers; but aside from this the public has no more right to these books, or to their contents, than any other private paper belonging to the distiller.

As before stated, the suit in Carroll County, Ky., was a proceeding to subject Block & Sons to the payment of taxes upon property alleged to have been unlisted—not only to the payment of taxes, *but also to the payment of a penalty of 20 per cent on the amount of such taxes as might be found to be due.* So, then, the proposition is to require Block to furnish from his books, kept by him in the course of his distilling operations, evidence not only of his failure to list his property for taxation, but evidence upon which he may be punished for such failure by being subjected to the payment of a penalty pronounced by the statute (section 4241, Code of Kentucky). Not only this. I assume that if Block, in making his return of property liable to taxation under the State laws of Kentucky, knowingly and willfully made a false return upon his oath, he would be indictable for perjury, and this evidence which is sought would therefore not only tend to make him liable for taxes and inflict upon him a penalty, but would also tend

to fasten upon him the crime of perjury. Under these conditions I insist that in the case pending in the State court of Kentucky Block could not have been compelled by a subpœna duces tecum or otherwise to produce these books to be used as evidence against him; and I contend that this position is in harmony with the principle decided in Boyd's case, where the effort was to compel the production of private papers of a claimant to be used as evidence upon which to secure a forfeiture of his property. Then, if the plaintiff in the Kentucky case was not entitled to have the books themselves, can it be held that he was entitled to the benefit of the contents of the books obtained from copies which Block had sent to the collector in response to a law of the United States which required him to do so?

Having treated of the subject in its relation to the distiller and his rights, I now come to consider it in the broader light of the rights of the Government of the United States.

To begin with, there is no law which required Comingore as collector to comply with the demand which was made upon him to file official copies of papers which he had in his custody as collector, to be used as evidence in any suit or proceeding pending in a court. The records, documents, and papers in the office of a collector of internal revenue belong to the Treasury Department of the United States, because the collector is an officer of that Department. The collector has no control of such documents and papers, except to preserve tl em and use them in the transaction of the business of his office. If at any time the Secretary of the Treasury or the Commissioner

of Internal Revenue should call for one of these documents or papers to be transferred from the collector's custody to the Department at Washington, it would have to go; and if the plaintiff in the Kentucky suit was entitled to the benefit of the contents of the reports which we have been considering, the only way in which he could obtain an official copy is under the provisions of section 882 of the Revised Statutes, which reads as follows:

> SEC. 882. Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof.

But if the reports themselves were to be used this could be secured by a subpœna duces tecum to the head of the Treasury Department, or someone under his direction, who would produce the original papers themselves in court for introduction as evidence in the trial of the cause.

I have been unable, after considerable research, to find a single case where a copy of a paper certified by a collector of internal revenue has been held to be competent testimony in a judicial trial.

It will be observed by reading the record, page 2, that no demand was made upon Comingore for the production of the original papers; it was only required of him that he file official copies and make them a part of his deposition.

However, I do not intend to hinge my case upon this point, which may be regarded as technical, but I take

the position that a State court can not by its process compel an officer of the United States having in his custody reports or returns such as are involved in this case to produce them to be used as testimony for or against a party to a suit in a State court. These reports are the property of the United States. They are Federal papers. They are a species of communications from the subordinate officers of the United States and persons operating manufacturing establishments in which taxable articles are produced to the taxing authorities of the United States, in order that the internal-revenue taxes of the United States may be properly assessed and collected.

The regulations made and issued by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, which are set out hereinbefore, are consistent with the purposes of the law. The object of the regulations were in furtherance of the orderly and efficient execution of the law, and therefore they have the force of law.

But, for the sake of the argument, assume that no such regulations had been issued—or that it should be held that they were inconsistent with the law—I maintain that these reports and communications from the subordinate officers and the distillers are privileged. They contain matter of a confidential character between officers of the United States and persons operating establishments for the production of taxable articles under the direction and supervision of such officers, and contain information which is intended exclusively for use in the administration of the internal-revenue laws. It would be against public policy and detrimental to the public interests to require the pro-

duction of such papers or communications as evidence in a controversy between individuals or in suits in the State courts. In this connection I call attention again to 15th Opinions of the Attorney-General, page 378, and the discussion of this subject by Attorney-General Devens and the authorities cited by him; also *In re Weeks*, heretofore cited, and quote from the opinion the following:

> The Federal Government can not dictate as to evidence in State courts, but it can not be required to provide evidence for them; and the State has no right to Federal instruments of purely Federal character for proof, unless they are left within its reach, and these are not, but are put without that reach. (82 F. R., 732.)

In reading the opinion from which this is taken, it will be readily understood what the learned judge meant when he said that these instruments were put beyond the reach of the State courts. He was referring to the existence of a regulation which he held to have the force of law and which directed that revenue officers should not produce as testimony such instruments.

I may say here, by way of parenthesis, that this opinion is upon a state of facts similar to that in the *Hirsch Case* (74 Fed. Rep., 928), and the decision directly in conflict with that in the said case. The Hirsch case is relied upon largely by the appellant in his brief to sustain the position that the plaintiff in the suit in the Kentucky court is entitled to have the reports for use as evidence. But even if the principle declared in the Hirsch case is the law, which I do not admit, it does not, I think, interfere with the position which I have taken relative to the reports or instruments involved in

this controversy. The question in the Hirsch case was as to the right of a State court of Connecticut to require Hirsch, who was a deputy collector of internal revenue, to produce, in obedience to a subpœna duces tecum, the application of one Cole to pay the special tax and have a license from the United States to retail spirituous liquors within said State. Cole was indicted in Connecticut for a violation of the retail liquor laws, and the paper sought was intended for use on his trial as evidence against him. Shipman, C. J., in the opinion in this case, says with reference to the question (p. 930):

> These applications are not of a private or secret character, because, under section 3240 of the Revised Statutes, each collector of internal revenue is required to keep conspicuously in his office, for public inspection, an alphabetical list of all persons who shall have paid special taxes within his district, and to state therein the time, place, and business for which such special taxes have been paid.

And further (p. 931):

> No regulation upon the subject now under examination is contained in the printed book of general regulations which has been issued for the guidance of internal-revenue officers.

Thus it will be seen that the fact that by section 3240 of the Revised Statutes the names of retail dealers licensed by the United States were required to be made public by being posted in a conspicuous place in the collector's office is one ground upon which Judge Shipman bases his opinion, and the reason assigned by him is that this required publication takes away the private or secret character of the instrument and that to have it produced as evidence is no

invasion of the private affairs or interests of the United States.

As a further basis of his conclusion, Judge Shipman says that there is no regulation forbidding the production of these applications by the revenue officers having them in custody, which I construe to mean that if there had been such a regulation the learned judge would have held it to have the force of law and to be sufficient to authorize the officer to decline to produce the papers.

The facts in our case differ from the facts in the Hirsch case in the two important particulars suggested in the opinion in the latter; for there is no law requiring the publication of any of the reports sought as evidence in this case, and in addition there is a positive regulation issued by the proper authority which forbids the officers to produce them as evidence in the State courts.

The opinion of District Judge Evans, who issued the writ of habeas corpus in this case and discharged Comingore, is given in full in the record, commencing on page 16. I call the attention of the court here particularly to the line of reasoning in this opinion and the authorities cited to support the decision. I regard the opinion as a cogent presentation of the law governing the question under consideration, supported by citations of authority fully sustaining the conclusion arrived at. For the convenience of the court I here reproduce the opinion, leaving out such portions of it as would be a reiteration of matter heretofore set forth in this brief, the points of such omission being indicated:

* * * * *

> There is no dispute about the facts, though it may be doubted whether the petitioner's imprisonment

was not wholly unauthorized upon the ground that the notary public had no power under the Kentucky Code to issue the process under which the arrest was actually made (sections 535, 538, Civil Code). But the court will not pass upon that point, inasmuch as all parties desire that there shall be a judicial determination of the very important and interesting questions involved, namely: Was it the duty of the collector of internal revenue to answer the questions propounded, and to give the information or furnish the official copies demanded of him, and has the State of Kentucky, as a litigant in a civil action in her own court, the right to exact it of that officer in such a case?

A question somewhat kindred to these has been passed upon by three different Federal courts. All of the cases, however, were different from this in two important particulars: First, that the information in each of them was desired in aid of the criminal laws of the States in regard to the occupation of retailing distilled spirits, as to which some of the facts are required to be made public by section 3240 of the Revised Statutes of the United States; and, second, the latest regulation bearing on the subject had not then been promulgated.

In the case of Hirsch (74 Fed. Rep., 928), Circuit Judge Shipman, of Connecticut, in an elaborate opinion, held that the collector should be compelled to testify. His opinion seems even to go to the extent of holding that the Treasury Department has no authority of law for making a regulation that would prevent it. The learned judge, in aid of the State court proceeding, seems to have held that the spirit of section 3240 of the Revised Statutes required a construction that would compel internal-revenue officers to testify in all cases where information was sought by the State as to who were retail

dealers in distilled spirits. If that be correct, it would seem to follow that the same liberality of construction would, on the other hand, require it to be held that the spirit of section 3167 forbids any collector to give the information demanded of the petitioner in cases like this; and, indeed, the public policy of the United States might seem also to require this construction. That section prohibits the collector and other internal-revenue officers from disclosing certain information they acquire from visits to distilleries, etc.

In a somewhat earlier case, *In re Hultman* (70 Fed. Rep., 701), Judge Williams, of the district of Arkansas, sitting by designation in Kansas, had expressed views exactly contrary to the Hirsch case, though this fact does not seem at that time to have come to the notice of Judge Shipman.

In the latest case, *In re Weeks* (82 Fed. Rep., 729), Judge Wheeler, of the district of Vermont, held with Judge Williams that the collector was not required to answer.

This conflict of authority seems to make necessary, or at least appropriate, a further examination of the whole subject.

It should not be, and I think never is, the purpose or desire of the Federal tribunals to interfere with any of the legitimate functions of the State courts or officers. Indeed, the leaning will be in the other direction. Judicial proceedings, Federal and State, are essential to the good order of society and to the protection of the rights of the individual citizen. Those proceedings would often prove abortive if the courts had not the most extensive powers as well as full authority to compel witnesses to testify to facts within their knowledge, and indeed to produce papers under their individual

control in proper cases. This general proposition is certainly true, notwithstanding there are many exceptions to it, notably such as pertain to privileged communications, incompetent testimony, testimony that would tend to degrade the witness or subject him to criminal prosecution, and such as is forbidden by public policy.

In this case if the petitioner had been called to testify only as to facts within his personal knowledge, no law would exempt him from that duty if what he knew was competent testimony and its admission was not forbidden by other rules. It is not claimed that any of the information desired at his hands is within his personal knowledge. It is all contained in certain reports made to him by the distillers and by other United States officers and which are in his possession in his official capacity as an officer of the United States.

As it is clear that they are not his private property, it is essential to accurately ascertain the nature of those reports and his relations to them and his duties respecting them.

In order to obtain money for the support of the Government, Congress has passed laws for the collection of the revenue to be derived from internal sources. A complete system has been established. It is placed under the Treasury Department. The Secretary of the Treasury is its head. It is operated through the Bureau of Internal Revenue, at the head of which is the Commissioner. The entire system is under his supervision, but subject to the control of the Secretary of the Treasury.

Section 3301, Revised Statutes, provides that every storekeeper shall on the first Monday of every month make a report to the collector of the quantity of distilled spirits in the warehouse in his

charge, and section 3307 requires that the distiller shall monthly make and swear to a report substantially similar.

These reports thus made to the collector in the course of administering the laws of the United States, and for this executive purpose alone, are now demanded of him by the State officials in the manner before shown.

Under the law in the exceptional instance of a distiller the property of the citizen is arbitrarily laid hold of by the United States as soon as it is manufactured and is kept under its control until the tax is paid, possibly eight years afterwards. Meantime these reports must be made. So far as the information contained in the reports is obtained from the distiller, it is extorted for the sole purpose of enabling the United States to ascertain and collect from him its revenues. This purpose is all that relieves both this act and that of so long holding his property from being mere tyranny. The information derived from these reports is not obtained for publication in any manner; it is entirely official. Under this state of fact it does not seem to the court that these reports are in any sense records open to the use of the public. They are the property of the United States in the custody of its officers. They were exacted for the sole purpose of collecting revenue. It is true that they are property of a peculiar character, but that does not alter the fact. Property is defined as being the exclusive right of control and dominion over a thing and may include anything that is subject to ownership. Public records and documents are such as are placed on the public files for the use or information of the public, to which the public has access and of which the public has the right, usually upon payment of certain fees, to demand copies. They

are not property in any ordinary sense. In many cases copies of the public records of the United States may be authenticated by the head of the department or other ultimate custodian. Familiar instances of such public records are those in judicial proceedings and where documents are required to be registered or recorded, patents for land, and many others. (See *Boyden* v. *Burke*, 14 Howard, 575.)

But there is no statute or law of the United States which authorizes or permits the collector of internal revenue to make or to certify for use by anyone else copies of the reports which have been gathered for particular governmental purposes.

The United States has not authorized the use of these executive documents by anybody for any purpose except the official one for which the reports were made. No statute is shown which gives the litigant in this case any right to claim the use of this property—the private property of the United States—for any purpose whatever. The petitioner is the immediate custodian thereof under the control of his superior officers. They have forbidden him to put this property of the United States to the uses required by the litigant in the State court, and yet the petitioner is arrested for obeying the orders of his superior officers respecting private papers of the Government in which the State of Kentucky has no interest whatever and over which it has no more lawful control than it has over any other property of the United States. The purpose for which the litigant desires this property can not affect the question of its right to it. It would not be contended that the State of Kentucky had any right to claim this property or its use except for the single quality it is supposed to have of silently testifying upon the issues involved in the case against Elias Block &

Sons. No logic is perceived in the possible suggestion that that makes a difference in right, though it may make the use more desirable in fact.

The State, except so far as it may be given by statute, has no right over the property or the archives of the United States Government.

No statute is shown to justify the claim now made, though a statute is necessary to make the claim good. No sovereign can claim or obtain the right to demand the use of the archives or quasi-private documents of another sovereign without its consent expressly given, and public policy forbids that any attempt to extort such use should be encouraged. Most unseemly, not to say dangerous, consequences might otherwise ensue.

The State, while it may compel the petitioner as a mere individual to tell what he may know in that capacity, has no power to control him as an officer nor to regulate the conduct of his official duties with reference to these reports nor their contents, as those duties can only be fixed by the laws of the United States and the orders and regulations of his superior officers.

Among the official duties thus prescribed for the petitioner in the conduct of his office and respecting the care of the property of the United States committed to his custody is that which requires that he shall not do with it what is demanded at his hands in this case.

It may be assumed to be clear that a State statute can not impose duties upon a Federal officer as such, much less can a State court do so. The attempt to do it in this case through the medium of a process of contempt must fail, because the State shows no statutory right thus to appropriate the property of the United States nor to impose a duty upon its officers. If it were otherwise and if the officers of the

United States in the discharge of their duties could be interfered with by State courts or officers, it might soon produce a state of affairs that would be intolerable. It might, for example, take much of their time or put them to great expense. If the State courts could for this purpose appropriate this property or could compel official copies to be made or official information to be compiled, where would the line be drawn, and *vice versa*, if the Federal authorities or courts could interfere with the duties of State officers, except in those cases expressly authorized by the supreme law of the land, or necessary to carry into effect the laws of the United States or to enforce the judgments of her tribunals. There is no law of the United States which would give the Federal authorities power over the property of a State except occasionally through the writ of *ad quod damnum* and through the exercise of the right of eminent domain.

While these views are believed to be correct as to mere property as distinguished from true public records, as above defined, it probably might not be held that Federal courts, on the one hand, and State courts upon the other, were incompetent to compel custodians of public records either to give copies lawfully demanded upon payment of fees or else to attend with the records in proper cases under a *subpœna duces tecum*. But this would be upon the ground that they are records to which all the public has the right of access. The right, however, if held to exist, would not extend to another class of papers which the State might own and which pertained to the conduct of its government and which its policy has not opened to the public. For example, in the early case of *Morris* v. *Creel* (2 Virginia Cases, 49) it was held that a paper submitted to the

executive council of Virginia for the purpose of enabling it to perform its executive functions ought not to be withdrawn by the clerk without the order of the council, and therefore no attachment should be awarded against the clerk for refusing to obey a *subpœna duces tecum* commanding him to produce the paper to be read in evidence.

Every paper in the custody of public officers is not a public record. Some, as in this case, may be mere papers belonging to the United States as documents pertaining to the administrative affairs of the United States and as mere property which the United States has obtained for its mere executive purposes and over which, through its proper agents and officers, it has exclusive control, and which the State can not demand for purposes of testimony or otherwise, contrary to regulations made under the authority of the Federal statutes.

It is altogether correct to say that neither the Secretary of the Treasury alone nor the Commissioner of Internal Revenue, with his approval, can make regulations having the force of law unless authorized to do so by Congressional enactment, but it is also believed to be true that sections 161, 251, and 321 together are ample to authorize the making of the regulations hereinafter set forth. They contain provisions as follows:

By section 161, "The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

By section 251 it is provided: "The Secretary of the Treasury shall prescribe rules and regulations

not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws, and give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law;" and

By section 321, that "the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue."

At all events, the following regulations were made, namely:

* * * * *

(See regulation heretofore copied.)

Now, as against persons desiring to use the property of the United States, these statutes should be liberally construed to preserve that property, and no third person has any right to gainsay it. He has no interest in the property. At all events, it is believed that the statutes and regulations constitute a binding rule for collectors of internal revenue in their control of the Government property entrusted to their care sufficient to justify them in rendering obedience to their chief, especially as against all outside persons, and also sufficient to excuse them for refusing to permit anybody to use or to get the benefit of that property who does not show some positive law of the United States as a basis of a demand for it.

Here the State of Kentucky is a litigant only in a civil suit, and it may well be supposed that the

general principle that when a government abandons its sovereignty and becomes a private litigant it is subject to ordinary rules should have some application, but whether so or not the court is convinced that the State can manifest no right to the papers asked for, except by means of some statutory enactment bestowing it or through some act of courtesy, as distinguished from a right, on the part of the lawful custodian.

It is an old rule that one government will not aid another in enforcing its revenue laws. Whether it should be applied to the operations of our State and National Governments need not, in the abstract, be considered. Certain it is, however, that no law of the State can be found which is intended to aid the National Government in the collection of its revenue, nor can any be found in the statutes of the United States which was intended to assist the States. Whether comity would require such enactments on the part of both need not be considered. The fact remains that such legislation has not been regarded as at all needful or desirable. The United States has a complete revenue system of its own, and equally so has the State. They are and must necessarily be entirely independent of each other, though, in some respects, notably in the matter of taxing the occupation of a retail dealer in distilled spirits, the statutes of the United States make it plain that by taxing the occupation it is by no means meant to authorize such occupation contrary to local laws. It only intends to tax the occupation if it is in fact carried on, but does not authorize it to be carried on. This is the basis of the provisions of section 3240 as well as 3243 of the Revised Statutes, and it should not be overlooked that while, by the regulations above given, the Treasury officials

undertake to control the use of the reports referred to, they do not undertake altogether to deprive litigants of their use as testimony, except so far as the lawful custodian thereof regards it as incompatible with the public interest. While he has the right and the power altogether to exclude others from all use of such property, yet, under certain circumstances, as matter of courtesy, copies of the papers will be furnished. Surely the owner of property or his sole agent may annex conditions to a grant of the use of it.

Indeed there might be many considerations of public policy to support that course in case of merely executive or administrative papers like these—considerations affecting both the amount and safety of the revenue.

Nor is the State of Kentucky powerless. It has its own independent and complete system for taxing distilled spirits. True, the power of the United States is supreme to the extent of having the first right, but the statutes of the State (sections 4105 to 4114, inclusive, Kentucky Statutes) provide ample machinery for compelling reports from distillers, and, indeed, everything else necessary for the purpose. The State has neither occasion nor right to call upon the United States nor her officers for reports made under the administration of its laws in order to enforce the collection of the State revenue, nor would the United States have the right to call upon the State. Each government must take care of its own concerns in such matters, and it is much doubted by the court whether the Commonwealth of Kentucky or the government thereof in any way really makes or desires to make this claim, although her name is used in the suit in the Carroll County court by the auditor's agent.

It may be added that the court has been influenced somewhat by the conviction that if the copies of the reports and the desired information were obtained from the collector they would be altogether inadmissible and incompetent as evidence, and that it would be ultimately so held by the State court. While the collector was practically ordered by the State court to furnish or permit to be taken copies of the reports or else to compile therefrom the data demanded, there is no law authorizing the collector to authenticate copies of papers, nor to compile figures from them so as to make them admissible as evidence, and the State court can not impose the duty upon him. He should not be imprisoned because the head of the Department will refuse to authenticate them, and a statement by him of what the papers contain, without producing the originals or authenticated copies, would probably be mere hearsay and by no means the best evidence of their contents; and if there has been a fishing expedition merely to get information upon which to base ulterior movements by the plaintiff in suit, surely the commitment of the petitioner would then be altogether inexcusable.

To sum up the whole matter, the court has reached the conclusion:

First. That the reports are executive documents, which the United States in its sovereign capacity has acquired for the sole purpose of administering its own governmental affairs.

Second. That the officers of the National Government can not be compelled by another sovereignty to put those documents at its disposal without some express law of the United States authorizing it.

Third. That such documents are privileged and to a certain extent quasi-confidential communications, the use of which is limited to the purposes for

which they are made, unless the parties interested consent to a more extensive use. This proposition more especially applies to the reports of the storekeeper.

Fourth. That any demand for their use by any outside party must depend for success upon the courtesy of the Government and upon its notion as to the public policy of complying with the request.

Fifth. That no litigant has any right to their use in any other way or upon any other basis than such as may be fixed by the United States or under its authority.

Sixth. That the reports are property, and their ownership rests in the United States.

Seventh. That the State of Kentucky, either as a litigant or otherwise, has no right to exercise any control over them through its courts or otherwise except as the right may be given by Congressional enactment or the courtesy of the Government.

Eighth. That the Secretary of the Treasury has lawful authority to control or to make regulations for controlling that property and its custody.

Ninth. That the regulations made were within its authority and show the only way in which the courtesy of the Government respecting the matter in hand will in the absence of legislation be exercised, and the courts have no power to overrule it.

Tenth. That the State court had no lawful jurisdiction, right, or power to impose upon the collector, an officer of another sovereignty, the duty of making copies of the reports, or that of permitting others to make them, or that of compiling information from their contents.

Eleventh. That the reports were parts of the governmental archives accumulated through mere executive and administrative processes, and as such

are privileged, at least to the extent that no other sovereignty in its own interest can seize or control them for any purpose whatever without the consent of the sovereign owner lawfully manifested; and

Twelfth. That the effort to make the collector testify to their contents is virtually an attempt to compel the United States to produce them.

The proposition underlying all the others is that nobody can acquire any control over or right in this class of papers belonging to the United States in any manner, except by its authority.

These conclusions seem to be supported by—

1 Greenleaf on Evidence, sections 250 and 251.

Jones, Law of Evidence, section 780.

United States v. *Elliason*, 16 Peters, 291.

Hagood v. *Southern*, 117 U. S., 52.

Ableman v. *Booth*, 21 Howard, 506.

Cunningham v. *Macon, &c., R. R.*, 109 U. S., 451, 452.

Electoral College Case, 8 Fed. Cases, 427.

Boyd v. *United States*, 116 U. S., 616.

Black on Constitutional Law, 441.

Ex parte Reed, 100 U. S., 13.

Carr v. *United States*, 98 U. S., 433.

Virginia Coupon Cases, 114 U. S., 286.

In re Ayers, 123 U. S., 443.

And to illustrate further it may be added upon the authority of *Ex parte Roland* (104 U. S., 612), that if a mandamus should be sought in this case it would not lie, because no statute has ever made it the duty of the collector to do as required by the State.

Of course, it has not been forgotten nor overlooked that there are cases where the production of private papers in the possession of third persons not parties to the litigation can be exacted, but this

is generally where the litigant has a rightful interest in them. The rule has no application here.

1 Greenleaf on Evidence, sec. 559.

1st ed. Am. & Eng. Ency. of Law, p. 257.

Otherwise the party is left to his own resources to obtain the paper or to lay the foundation for secondary evidence of its contents. If the litigant has no right in or to the papers in the hands of the third person, nor any legal interest in them, it might possibly violate the fourth amendment of the Constitution to force the latter to produce them by an unwarrantable seizure, actual or constructive; and in another connection, so far as the distillers' reports are concerned, *Boyd* v. *United States* might again apply.

It seems to the court upon these considerations that in refusing the demand made upon him, and for which he is now in custody, the petitioner, an officer of the National Government, is discharging a duty imposed upon him by the laws of the United States and by his lawful superior officer concerning the custody of the executive papers and private property of the United States committed to his official custody; that there is no law making it his duty to do otherwise than he did, and therefore that he is in the custody of the respondent in violation of the laws of the United States and of his rights thereunder, and should be discharged therefrom.

An offer was made to prove that it had been the custom of collectors, with the consent of the distiller, to give the desired information. The court held that such testimony, being objected to, was wholly immaterial, and could in nowise affect a case where neither the collector nor the distiller consented and where the Secretary and Commissioner forbade.

The petitioner is discharged.

In conclusion, I respectfully submit to the court that if it should be placed within the power of the State courts to compel the officers of the internal revenue to produce reports, instruments, and papers in their custody in connection with the administration of the law, to be used as evidence in such courts in litigation therein pending, great inconvenience, untold confusion, and constant interference with the officers of the Government in the discharge of their official duties will be the result. If it should be held that any State court can compel the production of these reports, then every State court acting within its jurisdiction can do it. A court of a justice of the peace, within the limit of jurisdiction, would have as much power to bring the collector, deputy collector, or other officer of the internal revenue, with the papers from his office, as would the highest court in the State, and thus officers who are relied upon by the Government to discharge their duties in behalf of the Government in assessing and collecting its revenues could be taken from their official work to give attendance upon State courts and to carry with them whatever reports or other papers might be sought for use as evidence. It can be readily seen how detrimental such a condition would be to the Government and to the efficient and orderly conduct of its business.

JAS. E. BOYD,
Assistant Attorney-General.